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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 KELLY LAVONNE WARGNIER,
11 Plaintiff,

12 vs.
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14 NATIONAL CITY MORTGAGE
15 INC., et al.,
16 Defendant.
17

CASE NO. 09cv2721-GPC-BGS

ORDER

**(1) DENYING DEFENDANTS’
MOTION FOR
RECONSIDERATION**

**(2) DENYING PLAINTIFF’S
MOTION FOR RULE 11
SANCTIONS**

[Dkt. Nos. 67, 70]

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19 Defendants have filed a second motion for reconsideration of the Court’s March
20 29, 2012 order granting in part and denying in part Defendants’ motion for summary
21 judgment. (Dkt. No. 67.) Plaintiff has filed a motion for Rule 11 Sanctions against
22 Defendants’ attorneys. (Dkt. No. 70.) For the reasons discussed below, the Court
23 **DENIES** Defendants’ motion for reconsideration and **DENIES** Plaintiff’s request for
24 sanctions.

25 **BACKGROUND**

26 Plaintiff Kelly Lavonne Wargnier (“Wargnier”) is a former employee of
27 Defendant National City Mortgage (“NCM.”) On or around February 28, 2008, and
28 during Wargnier’s leave of absence to deliver a baby, Wargnier was terminated

1 from her position.(Dkt. No. 42 at 4.) Wargnier filed a charge with the Equal
2 Employment Opportunity Commission (EEOC), which found that NCM had
3 discriminated against Wargnier on the basis of her pregnancy. (Id. at 5.) Following
4 receipt of her right to sue letter, Wargner filed the instant action. (Id.) Wargnier
5 alleges the following causes of action: (1) Violation of Title VII, PDA; (2)
6 Violation of California Government Code § 12945(a); (3) Common Law Pregnancy
7 Discrimination; (4) Tortious Discharge in Violation of Public Policy; (5) Breach of
8 Contract; (6) Breach of Implied Covenant of Good Faith and Fair Dealing; (7)
9 Violations of Labor Code §§ 201, *et seq.* and 2926 ; and (8) Defamation.

10 In an order dated March 29, 2012, Judge Whelan granted in part and denied
11 in part Defendants’ summary judgment motion and Plaintiff’s partial summary-
12 judgment motion. (Dkt. No. 42, “MSJ Order.”)

13 On May 17, 2013, Defendants filed a motion for reconsideration. (Dkt. No.
14 51.) Judge Whelan denied the motion for reconsideration on October 22, 2012.
15 (Dkt. No. 57, “Order Denying Reconsideration.”)

16 On February 12, 2013, this case was reassigned to Judge Curiel. (Dkt. No.
17 63.)

18 DISCUSSION

19 1. Motion for Reconsideration

20 For the second time, Defendants seek reconsideration of the MSJ Order.
21 Defendants bring their motion pursuant to Fed. R. Civ. P. 54(b) and 60(b)(6). In
22 opposition, Plaintiff asserts Defendants’ motion is untimely, fails to comply with
23 Local Rule 7.1.i.2, and cannot be properly brought under Fed. R. Civ. P. 54(b) or
24 60(b).

25 Although the MSJ Order and Order Denying Reconsideration were issued last
26 year, the Court may still consider an interlocutory order which “is subject to
27 revision at any time before the entry of judgment adjudicating all the claims and the
28 rights and liabilities of all the parties.” Fed. Civ. R. P. 54. Plaintiffs accurately

1 point out that the local civil rules require a motion for reconsideration be filed
2 within 28 days after entry of the ruling. L. Civ. R. 7.1.i.2 (“Except as may be
3 allowed under Rules 59 and 60 of the Federal Rules of Civil Procedure, any motion
4 or application for reconsideration must be filed within twenty-eight days after the
5 entry of the ruling order or judgment sought to be reconsidered.”) Here, the MSJ
6 order was filed in March 2012 and the Order Denying Reconsideration in October
7 2012. Although the local civil rules do not provide an exception under Federal Rule
8 of Civil Procedure 54, this Court has the inherent power to reconsider and modify
9 interlocutory orders before entering a final judgment. Accordingly, despite lack of
10 timeliness, the Court will apply a limited review of the Defendants’ motion and
11 apply case of the law doctrine.

12 “Under the law of the case doctrine, a court is ordinarily precluded from
13 reexamining an issue previously decided by the same court, or a higher court, in the
14 same case.” Richardson v. United States, 841 F.2d 993, 996 (9th Cir. 1988)
15 (citations omitted). Application of the law of the case doctrine is discretionary and
16 applies “when a court decides upon a rule of law, that decision should continue to
17 govern the same issues in subsequent stages in the same case.” Arizona v.
18 California, 460 U.S. 605, 618 (1983); Merritt v. Mackey, 932 F.2d 1317, 1320 (9th
19 Cir. 1991) (explaining that under the “law of the case doctrine,” one panel of an
20 appellate court will not reconsider questions which another panel has decided on a
21 prior appeal in the same case). For the law of the case doctrine to apply, “the issue
22 in question must have been ‘decided explicitly or by necessary implication in [the]
23 previous disposition.’” United States v. Lummi Indian Tribe, 235 F.3d 443, 452
24 (9th Cir. 2000) (quoting Liberty Mut. Ins. v. EEOC, 691 F.2d 438, 441 (9th Cir.
25 1982)). The doctrine was developed to maintain consistency and avoid
26 reconsideration of matters once decided during the course of a single, continuing
27 lawsuit. Ingle v. Circuit City, 408 F.3d 592, 594 (9th Cir. 2005). However, the law
28 of the case doctrine comes with some exceptions. A district court’s decision to

1 apply the doctrine will be deemed an abuse of discretion if “(1) the first decision
2 was clearly erroneous; (2) an intervening change in the law occurred; (3) the
3 evidence on remand was substantially different; (4) other changed circumstances
4 exist; or (5) a manifest injustice would otherwise result.” Lummi Indian Tribe, 235
5 F.3d at 452.

6 Defendants argue that each adverse finding against them was made in clear
7 error and results in manifest injustice; they do not assert any intervening change in
8 law, new evidence, or changed circumstances. Defendants seek reconsideration of
9 the order denying summary judgment on each the following claims: breach of
10 contract, breach of the implied covenant of good faith and fair dealing, defamation,
11 and discrimination.

12 The Court will not reconsider arguments and law that were previously
13 considered and ruled upon by the Court. A review of the Defendants’ first motion
14 for reconsideration reveals that Defendants’ present motion reflects the exact same
15 arguments, facts and case law. (See Dkt. No. 51, compare to, Dkt. No. 67.)
16 Defendants even fail to rectify the deficiencies in their arguments pointed out by the
17 Court in the Order Denying Reconsideration. For example, in denying the first
18 motion for reconsideration, the Court stated “NCM gives neither an explanation as
19 to how or why the [alleged defamatory] statements are absolutely privileged nor
20 applies section 47(b) and Williams to the facts at hand.” (Order Denying
21 Reconsideration at 4.) Rather than remedy their legal argument and apply the law to
22 the facts, Defendants merely rehash the very same arguments that failed before
23 Judge Whelan. (Def. Mtn. at 22-25.)

24 The Court reminds Defendants that reconsideration is not a mechanism for
25 parties to make new arguments that could reasonably have been raised in their
26 original briefs. See Kona Enters. v. Estate of Bishop, 229 F.3d 887, 890 (9th
27 Cir.2000). Nor is it a mechanism for the parties “to ask the court to rethink what the
28 court has already thought through—rightly or wrongly.” United States v.

1 Rezzonico, 32 F.Supp.2d 1112, 1116 (D.Ariz.1998). Rather, reconsideration is an
2 “extraordinary remedy” that is to be used “sparingly.” Kona, 229 F.3d at 890. “To
3 succeed, a party must set forth facts or law of a strongly convincing nature to induce
4 the court to reverse its prior decision.” United States v. Westlands Water Dist., 134
5 F.Supp.2d 1111, 1131 (E.D.Cal.2001).

6 Upon review of Defendants’ arguments previously considered and ruled upon
7 by Judge Whelan, the Court concludes that there is no showing of clear error or
8 manifest injustice to support reconsideration. There is no indication that Judge
9 Whelan did not carefully consider the law and the facts, and his legal conclusions in
10 the MSJ Order and Order Denying Reconsideration are sound. Defendants’ bald
11 assertion that Judge Whelan’s findings are a “clear error of law” and result in
12 “manifest injustice” are conclusory. As a result, the Court declines to reconsider
13 Defendants’ challenge to the Court’s findings on Plaintiff’s breach of contract,
14 breach of covenant of good faith and fair dealing, discrimination and defamation
15 claims.

16 For these reasons, the Court **DENIES** Defendants’ motion for
17 reconsideration.

18 **2. Motion for Rule 11 Sanctions**

19 Plaintiff presents seven reasons why sanctions are in order against
20 Defendants:

- 21 1. Filing a second motion for reconsideration of a matter that has already
22 been thoroughly vetted on a prior motion for reconsideration is such an
23 unusual occurrence under the federal rules that there should, at minimum, be
24 an unusual reason stated for bringing the motion.
- 25 2. Defendants have not stated new facts, change in intervening law, clear
26 error or manifestly unjust ruling, or other unusual circumstances, as is
27 normally required for a motion for reconsideration under the federal rules,
28 much less, a second motion for reconsideration of a prior motion for
reconsideration.
3. Defendants challenge multiple claims without actually showing any clear
error of law.
4. Rather than directly address the Court’s October 22, 201 analysis,
defendants have, rather, presented essentially the same arguments in their
second as in their first motion for reconsideration.
5. Defendants’ failure to seek leave prior to filing a motion for
reconsideration.

1 6. Defendants' failure to seek certification of any issue or file writ of petition
2 with the higher court.
3 7. Defendants' efforts are out of proportion to the case before the Court, and
4 the case is now being driven by attorney fees under section 1988. (Dkt. No.
5 70 at 1-2.)

6 Rule 11 provides that "by presenting to the court (whether by signing, filing,
7 submitting, or later advocating) a pleading, written motion, or other paper, an
8 attorney ... is certifying that to the best of [his] knowledge, information, and belief,
9 formed after reasonable inquiry under the circumstances

10 (1) it is not being presented for any improper purpose, such as to harass or to
11 cause unnecessary delay or needless increase in the cost of litigation;
12 (2) the claims, defenses, and other legal contentions therein are warranted by
13 existing law or by a nonfrivolous argument for the extension, modification, or
14 reversal of existing law or the establishment of new law;
15 (3) the allegations and other factual contentions have evidentiary support or,
16 if specifically so identified, are likely to have evidentiary support after a
17 reasonable opportunity for further investigation or discovery; and
18 (4) the denials of factual contentions are warranted on the evidence or, if
19 specifically so identified, are reasonably based on a lack of information and belief.

20 Fed.R.Civ.P. 11(b). A finding of actual "bad faith" is not necessary to impose
21 sanctions under Rule 11. Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792
22 F.2d 797, 800 (9th Cir.1986). Sanctions are appropriate "when a pleading which has
23 been filed 'is frivolous, legally unreasonable, or without factual foundation.' " Id.
24 (quoting Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir.1986)); accord
25 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). The standard
26 governing both the "improper purpose" and "frivolous" inquires, as set forth in Rule
27 11(b) is an objective standard of reasonableness. G.C. & K.B. Inv. Inc., 326 F.3d at
28 1109.

Although Defendants fail to offer new facts or law in their motion for
reconsideration, as discussed above, Defendants' motion is not improper or
frivolous. Defendants have provided sufficient authority upon the second motion
for reconsideration that is based in law and fact. While the arguments were
insufficient to overcome the high hurdle for reconsideration, the filing of the motion
alone does not suggest an improper motive or purpose. As Defendants' cite in their


1 brief, under certain circumstances, Courts may reconsider previous findings until
2 the final order of judgment. Moreover, the attorneys' filing of the motion represents
3 zealous representation of their clients. As held by the Ninth Circuit, counsel
4 "owe[s] a duty to her client to continue to press for reconsideration as long as . . .
5 her arguments were soundly based in fact and in law." Conn v. Borjorquez, 967
6 F.2d 1418, 1421 (9th Circuit 1992). The Court will not impose sanctions upon the
7 Defendants' attorneys, whose motion is soundly based in law and fact, and whose
8 filing merely attempted to present their arguments before a newly assigned judge.
9 For these reasons, the Court **DENIES** Plaintiff's motion for Rule 11 sanctions.

10 **CONCLUSION**

11 For the above stated reasons, the Court hereby **DENIES** Defendants' motion
12 for reconsideration and **DENIES** Plaintiff's motion for sanctions. Accordingly, the
13 Court **VACATES** the hearing date set for Friday, July 26, 2013.

14 **IT IS SO ORDERED.**

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16 DATED: July 22, 2013

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18 HON. GONZALO P. CURIEL
19 United States District Judge
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